IN THE MISSOURI SUPREME COURT

NO. 77067

STATE OF MISSOURI

Respondent,

v.

JOSEPH WHITFIELD

Appellant.

APPELLANT'S REPLY BRIEF IN SUPPORT OF MOTION TO RECALL THE MANDATE

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JOSEPH WHITFIELD'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, MADE APPLICABLE TO THIS PROCEEDING BY THE FOURTEENTH AMENDMENT, WAS VIOLATED WHEN HE WAS SENTENCED TO DEATH BY THE TRIAL COURT DESPITE THE FACT THAT THE JURY VOTED ELEVEN TO ONE FOR A LIFE SENTENCE, IN THAT THERE IS NO INDICATION IN THE RECORD THAT THE JURY UNANIMOUSLY FOUND (1) THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, (2) THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT WARRANTED THE IMPOSITION OF THE DEATH PENALTY, OR (3) THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT WAS NOT OUTWEIGHED BY EVIDENCE IN MITIGATION, SINCE EACH OF THESE FINDINGS IS A FACT NECESSARY TO INCREASE MR. WHITFIELD'S PUNISHMENT FROM LIFE IMPRISONMENT TO DEATH UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN *RING v. ARIZONA*.

I. Respondent Fails to Understand the Holding of *Ring*

Respondent's contention that Mr. Whitfield's *Ring* claim is meritless is based on Respondent's failure or refusal to understand the essential holding of *Ring*, and Respondent's failure to analyze Missouri's capital punishment procedure in light of *Ring*. The Arizona procedure at issue in *Ring* required the court, not the jury, to determine if a statutory aggravating circumstance making the defendant death-eligible existed. So it is partly correct to assert, as does Respondent, that "[t]he Supreme Court held in *Ring* that a jury must find the existence of the fact that a statutory aggravating circumstance exists." Resp. Br. 14. However, the holding of *Ring* is not limited to statutory aggravating circumstances, as Respondent contends.

The essential holding of *Ring* is that facts which are necessary to increase the range of punishment from life imprisonment to death are "the functional equivalent of an element of a greater offense." *Ring*, 122 S. Ct. at 2443. (Emphasis added) Therefore, the Sixth Amendment right to trial by jury requires that these "elements" be unanimously found by a jury beyond a reasonable doubt.[1] *Id*. That holding is not limited to aggravating circumstances, statutory or

[1]Justice Breyer goes even further, declaring, "...the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to

otherwise.

Missouri has adopted a capital sentencing procedure which involves four distinct findings to be made at a penalty phase trial after a defendant is found guilty of first-degree murder: (1) Has the state proved the existence of at least one statutory aggravating circumstance beyond a reasonable doubt? (2) Does the evidence in aggravation (including both statutory and nonstatutory aggravating circumstances) warrant the imposition of death as punishment? (3) Are there mitigating circumstances sufficient to outweigh the aggravating circumstances?[2] (4) Shall this defendant be sentenced to death for this murder? Mo. Rev. Stat. § 565.030. Even a cursory analysis shows clearly that the first three of those questions serve to narrow the class of first-degree murderers who are eligible for

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sentence a person to death. *Ring*, 122 S.Ct. at 2448 (Breyer, J., concurring in the judgment).

[2]This third and the fourth steps of penalty phase deliberations are where Missouri complies with the constitutional mandate that "each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 442-3 (1990); *accord*, *Mills v. Maryland*, 486 U.S. 367 (1988); *see also Lockett v. Ohio,* 438 U.S. 586 (1978).

the death penalty. Only the fourth question involves the selection of which of those death-eligible defendants shall be sentenced to death.

In *Ring* terms, then, the answers to the first three questions are facts which increase the possible punishment for first-degree murder from life without parole to death. Those first three questions involve findings which are the functional equivalent of elements of the greater offense of death-eligible first degree murder. Those findings, therefore, must be made by a jury under *Ring*.[3]

It is clear that this aspect of Mr. Whitfield's Sixth Amendment right to a trial by jury was not honored – nowhere in the record is there any finding by the jury of any statutory aggravating factor making Mr. Whitfield eligible for a death sentence. Nowhere in the record is there any finding by the jury that the evidence in aggravation of punishment, taken as a whole, would warrant the imposition of a death sentence upon Mr. Whitfield. Nowhere in the record is there any finding by

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[3]Indeed, it can be argued that the fourth step - the ultimate decision whether to impose a death sentence - is also a *Ring* element. It is the resolution of "the central issue in the proceeding - whether death [is] the appropriate punishment for [the defendant's] offense." *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984). An answer in the affirmative is a "fact" required to make a defendant eligible for a death sentence.

the jury that the evidence in aggravation of punishment is not outweighed by the evidence in mitigation of punishment. *See* Mo. Rev. Stat. 565.030. As Mr. Whitfield demonstrated in his opening brief, *each* of these findings is a fact necessary to increase the range of punishment for murder in the first degree from life imprisonment to death under Missouri law. Since none of these facts was found by Mr. Whitfield's jury, he was sentenced to death in violation of his right to trial by jury. *See Ring*.

The *Ring* violation is most obvious as to the third step of the process. If the jury had unanimously found that the aggravating circumstances were outweighed by mitigating circumstances, then they were instructed to return a life sentence; however, if they were unable to agree on whether the aggravating factors were outweighed by the mitigating factors, they could only return the verdict form stating that they could not agree on punishment. Instruction No. 25 (Resp. App. 8-9). This is the form they returned. That verdict form cannot in any sense be construed as a unanimous finding that the aggravating factors were not outweighed by mitigating factors.

A simple reading of Mo.Rev.Stat. §565.030.4 makes it clear that a finding that the aggravating circumstances are not outweighed by mitigating circumstances is required before the jury can consider whether to impose a death sentence. In

other words, this third step in the capital deliberation process is certainly an element of death-eligible first-degree murder under *Ring*. "[W]hether the statute calls them elements of the offense, sentencing factors, or Mary Jane, [they] must be found by the jury beyond a reasonable doubt." 122 S. Ct. at 2444 (Scalia, J., concurring). Significantly, Respondent does not deal with step three of the deliberation process in his Brief.

With regard to the first two steps of the penalty deliberation process – the existence of one or more statutory aggravating circumstances and whether the evidence and aggravation of punishment, taken as a whole, warranted imposition of the death penalty – the verdict of the jury is completely silent. From this silent record, Respondent now seeks the benefit of a legal fiction to the effect that the jury must have found some statutory aggravating factor or the jury would have rendered a verdict of life imprisonment.

However, that legal fiction is untenable in light of the fundamental holding of *Ring* – all of the facts which are necessary to make a defendant eligible for death are "elements" of a greater offense. Certainly, nowhere else in the criminal law can a court infer the existence of findings as to elements of an offense from a jury's failure to reach a unanimous verdict.

Moreover, that legal fiction is at odds with common experience. Consider,

for example, the situation of a single juror who adamantly insists on a death verdict. That juror will never agree to a life sentence no matter how clearly and explicitly the instructions may seem to require it. The only verdict form that jury could possibly return would be the nonunanimous form. That is probably what happened in Mr. Whitfield's case, since the jury deadlocked eleven to one in favor of life. *State v. Whitfield* 939 S.W.2d 361, 365 (Mo. banc 1997).

Consider, at the other extreme, a situation where one single juror believes that no statutory aggravating factor has been proved beyond a reasonable doubt, or that the evidence in aggravation does not warrant death. Only rarely can that single juror be expected to persuade all 11 other jurors to return a verdict of life imprisonment. That is apparently what occurred in the recent case of *State v. Thompson*, No. SC 83661 (Mo. banc Aug. 27, 2002).[4] In *Thompson*, as in Mr. Whitfield's case, the jury was given three verdict forms for each murder count, one for a verdict of life

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[4]The *Thompson* opinion is not yet final, and is not being cited as precedent. However, the facts of Thompson illustrate Mr. Whitfield's point with regard to the fictional nature of Respondent's assumption that Mr. Whitfield's jury must have unanimously found the existence of a statutory aggravating factor and must have unanimously found that the evidence in aggravation of punishment warranted the imposition of a death sentence upon Mr. Whitfield.

imprisonment without parole, one for a verdict of death, and one for a verdict of inability to agree upon the punishment. The jury in *Thompson* returned verdicts of life imprisonment on each count. The court then polled the jury asking each individual juror "is that verdict?" Only one juror stated that was his verdict; each of the other 11 jurors answered the question in the negative.

Rather than understanding, as Respondent asks this Court to assume Mr. Whitfield's jurors understood, that the verdict of life imprisonment necessarily resulted from the failure of the jurors to agree as to the existence of a statutory aggravating circumstance or the failure of the jurors to agree that the evidence in aggravation warranted the imposition of the death penalty, the trial judge refused to accept the original verdict and sent the jury back to deliberate further. Obviously, believing that their reading of the instructions (the same reading Respondent asks this Court to assume Mr. Whitfield's jury gave the instructions) was incorrect, the *Thompson* jury then returned verdicts stating they were unable to agree on punishment.

By showing what actually did happen when a capital jury was unable to agree on one of the first two steps in the sentencing phase and literally construed the instructions as the Respondent construes them to require a life verdict, the *Thompson* case illustrates the folly of assuming that all capital juries which return

non-unanimous verdicts must have construed the instructions in that same literal way. The possibility that the life verdicts were the result of nonunanimity on one of the first two steps of the penalty deliberation procedure obviously never even occurred to the *Thompson* trial court, or the polling would have been done differently. The *Thompson* case also illustrates that even a jury which has correctly construed the instructions can be led eventually to disregard that construction of the instructions and to return a non-unanimous verdict although one or more of the jurors has not concurred in one of the first two steps of the capital deliberation process. *See* Mo. Rev. Stat. 565.030.

Respondent glosses over the obvious fact that Mr. Whitfield was, in fact, sentenced to death by a judge based upon findings made by that judge, not based upon any findings made by the jury or attributed by the judge to the jury. The record is totally **silent** as to any findings by the jury which would make Mr. Whitfield eligible for a death sentence. In contrast, the record is full of findings by the judge after the jury was unable to agree on punishment. For Respondent to urge that this procedure does not violate Mr. Whitfield's rights under *Ring v. Arizona*, is truly baffling. The essence of *Ring* is the requirement that a jury make these findings; and the indisputable and uncontroverted fact is that no such jury findings were made in Mr. Whitfield's case – rather, all findings required under

the statute to make Mr. Whitfield eligible for the death penalty were made by the trial judge. Mr. Whitfield was sentenced to death in violation of his right to jury trial under the Sixth Amendment to the United States Constitution, and he implores this Court to remedy this injustice.

II. This Court May Recall Its Mandate When Its Decision Conflicts With a Decision of the United States Supreme Court

Respondent asserts, in essence, that a Motion to Recall the Mandate does not provide a remedy when a decision of the United States Supreme Court renders a defendant's sentence unconstitutional. Respondent is certainly incorrect.

Respondent also asserts, incorrectly, that this Court cannot retroactively apply *Ring* to cases in which the appeal was final before *Ring* was issued. Respondent also misreads the opinion of the United States Supreme Court in *Griffith v. Kentucky*, 479 U.S. 314 (1987), claiming that *Griffith* states that "new rules" pertaining to criminal prosecutions may be applied retroactively to federal and state cases *only* when the cases are still on direct review or not yet final. Contrary to Respondent's argument, *Griffith* did not restrict retroactive application, but rather simply held that new rules *must* be applied retroactively to all cases still pending on direct review. It did not *restrict* retroactive application beyond that class of cases.

In Missouri, a court may reacquire jurisdiction in certain circumstances by recalling its mandate. *State v. Thompson*, 659 S.W.2d 766, 768 (Mo. banc 1983). This Court possesses "'the judicial power to recall a mandate for certain purposes.'" *Thompson*, 659 S.W.2d at 768 **(**citing *Reimers v. Frank B. Connet Lumber Co.*, 273 S.W.2d 348, 349 (Mo. 1954).

Missouri cases addressing motions to recall the mandate identify some of the circumstances in which a mandate may properly be recalled, which include the following: (1) to remedy a deprivation of the federal constitutional rights of a criminal defendant; (2) to correct an appellate court decision when it directly conflicts with a decision of the United States Supreme Court; (3) to correct defects in appellate court proceedings; and (4) to allow a defendant, in certain circumstances, to raise a claim of ineffective assistance of appellate counsel. *See generally Thompson*, 659 S.W.2d at 768-69; *State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc. 1999); *State v. Palmer*, 976 S.W.2d 29 (Mo. Ct. App. E.D. 1998); *State v. Teter*, 747 S.W. 2d 307, 308 (Mo. Ct. App. W.D. 1988).

All of the above-stated circumstances are implicated in Mr. Whitfield's case. Mr. Whitfield was sentenced to death in direct conflict with the rule of *Ring*, which violated his rights under the Sixth and Fourteenth Amendments. When this Court affirmed his conviction and sentence in *State v. Whitfield*, 939 S.W.2d 361 (Mo.

banc 1997), its decision necessarily rested on a deprivation of Mr. Whitfield's constitutional right to jury trial. Although the jury voted eleven-to-one for life, Mr. Whitfield was sentenced to death by the trial court, based solely on findings made *not* by the jury, but by the trial court. This clearly violates the rule of *Ring*.

Just as the trial court's action imposing the sentence violated Mr. Whitfield's right to jury trial, this Court's affirmance of the sentence also violated his Sixth Amendment right, as recognized by the United States Supreme Court in *Ring*. Thus, this Court's decision conflicts with a decision of the United States Supreme Court, and it is therefore necessary to correct a defect in the appellate proceedings.

Clearly, the circumstances enumerated above are present here. Therefore, a motion to recall the mandate is proper.

Although a Sixth Amendment *Ring*-type claim was presented in the post-conviction motion court, this claim was not expressly briefed in the consolidated appeal. However, Mr. Whitfield did brief the related claim that trial counsel was ineffective for failing to ascertain the trial judge's views on the death penalty to guard against the possibility that the ultimate sentencing decision would be made by someone, other than the jurors, with an impermissible bias in favor of death. *See* opening brief at 6. To the extent that the *Ring*-type claim was not fully presented

to this Court, Mr. Whitfield suffered the ineffective assistance of appellate counsel when the issue was not raised in the direct appeal portion of his consolidated appeal. Under these circumstances, a motion to recall the mandate is proper.

Respondent incorrectly asserts that this Court's decision in *Thompson* "made clear" that a Supreme Court decision upholding the rights of the accused "must be one that applies retroactively." Respondent misinterprets the *Thompson* decision. In *Thompson*, this Court refused to recall its mandate because the rights of the criminal defendant had *not* been abridged. *Thompson*, 659 S.W.2d at 769. Rather, the original decision, which the *State* sought to have recalled based on a change in the law, was a decision "in favor of the liberty of the accused." This Court explained that a criminal *defendant* should not be burdened with the concern that after the proceedings against him are closed, a change in the law or in the composition of the court might render him susceptible to further imprisonment.

Thus, the *Thompson* decision is one that protects the rights of the criminal defendant. Nowhere does *Thompson* state that a change in the law which renders the defendant's sentence illegal or unconstitutional cannot be addressed in a motion to recall the mandate. To the contrary, a motion to recall the mandate exists to correct decisions that "directly conflict with a decision of the United States Supreme Court." *Id*.

In *Thompson*, this Court also discusses decisions of the Missouri courts of appeal in *State v. McReynolds*, 581 S.W.2d 465 (Mo. Ct. App. W.D. 1979) and *State v. Nevels*, 581 S.W.2d 138 (Mo. Ct. App. W. D. 1979). In those cases, the appellate court recalled its mandate based on a decision of the United States Supreme Court holding that the automatic exemption of women to serve on juries was unconstitutional and that this rule applied retroactively to all cases decided after Supreme Court's decision in *Taylor v. Louisiana*, 419 U.S. 522 (1975). *See Lee v. Missouri*, 439 U.S. 461 (1979).

Although noting that the United States Supreme Court addressed retroactivity in *Lee*, the *Thompson* Court does not state that a declaration regarding retroactivity by the United States Supreme Court is *necessary* to determine if a constitutional rule may be retroactively applied in *state* court. In short, there is nothing in *Thompson* that bars application of the rule of *Ring* to Mr. Whitfield's case.

Next, the State claims that the United States Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987), holds that new rules maybe "applied retroactively *only* to cases, state or federal, pending on direct review or not yet final. Resp. Brief at 11 (emphasis added). Respondent clearly misinterprets *Griffith*. In *Griffth*, the United States Supreme Court simply stated that new rules

must be applied to cases still pending on direct review. The Court stated nothing about barring application of new rules to other cases, no matter what the circumstances. *See Griffith*, 479 U.S. at 713-16.

Respondent also attempts to suggest that federal nonretroactivity doctrine, which was developed in federal court to address claims on federal habeas, may be applied in state court to bar consideration of claims in a motion to recall the mandate. Mr. Whitfield asserts that federal nonretroactivity doctrine, as stated in *Teague v. Lane*, 489 U.S. 288 (1989), and related cases has *no* application in state court, as state courts may develop and apply their own procedural rules.

In the event, however, this Court determines that the federal nonretroactivity doctrine contains principles that may be applicable here, Mr. Whitfield asserts that *Teague* does not bar application of *Ring* to his case.

The *Teague* rule does *not* bar the application of *Ring* to Mr. Whitfield's case because: (1) *Ring* is a new rule of *substantive* law, not *procedural* law, and *Teague* thus does not apply; and (2) alternatively, the rule of *Ring* fits squarely within one or both of the *Teague* exceptions, thus permitting retroactive application.

As discussed above, the rule of *Ring* holds that aggravating factors in a capital case create *distinct offenses, with distinct elements*. Because *Ring*

addresses *elements* of an offense, it concerns a rule of *substantive* criminal law, not *procedure*. The non-retroactivity rule of *Teague* thus has no application to Mr. Whitfield's *Ring* claim.

In *United States v. Bousley*, 523 U.S. 614 (1998), the United States Supreme Court stated that the non-retroactivity rule of *Teague* applies only to procedural rules and is "inapplicable to situations in which [the courts] decide the meaning of a criminal statute enacted by Congress." *Bousley*, 523 U.S. at 619-620 (quoting *Teague)*. Because *Teague* distinguishes between rules of "substance" and "procedure," the petitioner was able to obtain the benefit of the Supreme Court's recent decision in *Bailey v. United States*, 516 U.S. 137 (1995), pertaining to the interpretation of a federal gun statute even though his case was on collateral review. The *Bousley* Court concluded that *Bailey* concerned a new rule of *substantive* law. *Bousley*, 523 U.S. at 620-21. *See also United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997) (rule of *Bailey* is substantive rather than procedural and thus should be applied retroactively; decision in *Bailey* articulates "substantive elements" that government must prove to convict under section 924(c)).

Under the express language of *Teague*, which limits the non-retroactivity doctrine to rules of criminal *procedure*, and under the holding of *Bousley*, which

addresses the distinction between rules of *procedure* and *substantive criminal law*, it is therefore clear that the rule of *Ring* must be applied retroactively.

The core of the criminal law is the establishment and definition of criminal offenses and the penalties applicable to them. Ever since the landmark case of *United State v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), it has been clear that only the legislature is vested with the power to designate particular conduct as criminal. For an act to be criminal, the "legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare that the court shall have jurisdiction of the offense." *Id.* at 34. Simply put, "'the power of punishment is vested in the legislative, not in the judicial department.' *United States v. Laub*, 253 F. Supp. 433, 456 (E.D.N.Y 1966) (quoting *United States v. Wiltberger*, 5 Wheat (18 U.S.) 76, 95 (1820)). Under our system of government, only the legislature, not the courts, can make conduct criminal. *See Bousley*, 523 U.S. at 620-21.

In *Ring*, the Supreme Court noted that it had earlier concluded in *Jones v. United States*, 526 U.S. 227 (1999) that the federal car-jacking statute, which included higher maximum penalties based on the degree of injury inflicted, defined "three distinct offenses" rather than "a single crime with a choice of three maximum penalties." *Ring*, 122 S. Ct. at 2438. As a result, the "acts . . . necessary to trigger the escalating maximum penalties fell within the jury's province to decide." *Id.* In

Ring, the Court addressed the conflict between its decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Walton v. Arizona*, 497 U.S. 639 (1990), in which the Court had upheld the same capital sentencing scheme that was later challenged in *Ring*. In this scheme, the sentencing judge, rather than a jury, had to make the necessary factual findings before the defendant was eligible for the death penalty. Ultimately, the Supreme Court held that *Walton* was incompatible with *Apprendi* and it therefore overruled *Walton*. *Ring*, 122 S. Ct. at 2440-43. In reaching this conclusion, the Court repeatedly stressed that its decision rested on the principle that sentencing factors which increased the maximum punishment established *distinct offenses* with distinct elements, thereby following its conclusion in *Jones*. Quoting *Apprendi*, the Court stated that a "sentence enhancement" which increases "the maximum authorized statutory sentence . . . is the functional equivalent of an element *of a greater offense* than the one covered by the jury's guilty verdict." *Ring*, 122 S. Ct. at 2441 (emphasis added).

As the above discussion makes clear, *Ring* is not a case about rules of criminal *procedure*. Rather, it addresses the *substantive* criminal law question of whether a fact which increases the maximum punishment applicable to a crime actually creates a *new and distinct crime*, one which, as discussed above, is a "greater offense than the one covered by the jury's guilty verdict." Just as in

Bousley, the *Ring* Court was determining what constituted an offense and what constituted its elements – issues at the core of criminal law. *See also Davis v. United States*, 417 U.S. 333, 346-47 (1974) (petitioner may properly assert in a section 2255 proceeding a claim concerning an intervening *substantive* change in the interpretation of a federal criminal statute).

Because *Ring* concerns a new rule of substantive law rather than procedural law, the rule of *Ring* is applicable to cases on collateral review. The *Teague* bar simply does not apply. In *Bousley*, the Court recognized the "distinction between substance and procedure is an important one in the habeas context." *Bousley*, 523 U.S. at 620. *Teague*, by its owns terms, "applies only to procedural rules." *Id*.

In sum, *Ring* addresses the fundamental criminal law question of whether a fact which increases the maximum punishment applicable to a crime actually creates a *new and distinct crime*. The *Ring* decision answered that question in the affirmative. Because *Ring* addresses a fundamental criminal law question, and determines the meaning of a criminal statute enacted by a legislative body, it is concerned with the substantive criminal law, not rules of criminal procedure.

Under the terms of *Teague* and *Bousley*, the benefit of the decision in *Ring* is therefore available to petitioners whose cases are pending on collateral review. Consequently, Mr. Whtifield is not barred by the *Teague* doctrine from seeking

application of the *Ring* decision to his case.

If this Court determines that the rule of *Ring* is both "new" and "procedural," and that the *Teague* doctrine therefore applies, then Mr. Whitfield submits that his case falls within one or both of the *Teague* exceptions.

Under *Teague*, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. The United States Supreme Court announced two exceptions under *Teague*. The non-retroactivity doctrine does *not* apply if the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" or if the new rule may be considered "a watershed rule of criminal procedure." *Teague*, 489 U.S. at 311. The *Teague* exceptions recognize that one of the "principle functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" 489 U.S. at 312 (quoting *Desist v. United States*, 394 U.S. 244 (1969)).

In *McIntyre v. Trickey*, 938 F. 2d 899 (8th Cir. 1991), the Eighth Circuit addressed the first *Teague* exception, which allows a habeas petitioner to rely on a new rule if it places "certain kinds of primary, private individual conduct beyond

the power of the criminal law-making authority to proscribe." *McIntyre*, 938 F. 2d at 903. This exception, briefly discussed in *Teague*, was addressed more fully in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the United States Supreme Court addressed the constitutionality of imposing the death penalty on mentally retarded defendants. Although *Teague* had described the first exception as focusing on new rules "according constitutional protection to an actor's primary conduct," *Penry* stated that the first exception also encompasses "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." *Penry*, 492 U.S. at 329; *see also McIntyre*, 938 F.2d at 903. Deciding that a new rule prohibiting the execution of mentally retarded defendants would fit within the first *Teague* exception, the *Penry* Court explained:

> A new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. *In both cases, the Constitution itself deprives the State of the power to impose a certain penalty,* and the finality and comity concerns underlying Justice Harlan's view of retroactivity . . . have little force.

Penry, 492 U.S. at 330 (emphasis added); *see also Atkins v. Virginia*, 122 S.

Ct. 2242 (2002). The *Penry* Court added: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id*. Thus, the first *Teague* exception covers "not only rules forbidding criminal punishment of certain kinds of primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330; *see also McIntyre*, 938 F.2d at 903.

In *Butler v. McKellar*, 494 U.S. 407 (1990), the United States Supreme Court described the first *Teague* exception as encompassing "categorical guarantees accorded by the constitution such as a prohibition on the imposition of a particular punishment on a certain class of offenders." *Butler*, 494 U.S. at 415.

Before a death sentence may be imposed, the Eighth Amendment requires the State to establish an aggravating circumstance so that there may be a "meaningful basis" for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). Because this rule "circumscribe[s] the class of persons eligible for the death penalty," *Zant v. Stephens*, 462 U.S. 862, 878 (1983), it necessarily places a "certain class of individuals" (those to whom the State has not established a valid aggravating circumstance) beyond the State's power to punish by death. *See*

Penry, 492 U.S. at 330. Any such rule concerning application of the death penalty is necessarily retroactive and falls within the first *Teague* exception because it concerns the State's power to impose a certain penalty on a certain class of individuals. *Id*. (rule placing certain class of individuals beyond State's power to punish by death is analogous to new rule placing certain conduct beyond State's power to punish at all; in both instances, the Constitution deprives the State of the power to impose a certain penalty).

In *Ring*, the United States Supreme Court determined that the imposition of the death penalty by a judge in the absence of aggravating factors found by a jury violates the right to jury trial guaranteed by the Sixth Amendment. Thus, the Constitution deprives the State of the power to impose a certain penalty on a particular class of offenders, i.e., those individuals who were sentenced to death despite the lack jury factual findings. *See Penry*, 492 U.S. at 330; *Butler*, 494 U.S. at 415.

In *McIntyre*, the Eighth Circuit addressed in detail the application of the first *Teague* exception, holding that because the double jeopardy clause barred an unconstitutional prosecution, a rule concerning double jeopardy was analogous to the rule discussed in *Penry*, which would have barred the imposition of an unconstitutional punishment. *McIntyre*, 938 F.2d at 904. By the same token, the

rule of *Ring* also serves to bar the imposition of an unconstitutional punishment. Because of this, it falls under the first *Teague* exception, as defined by the Supreme court in *Penry* and as discussed by the Eighth Circuit in *McIntyre*. The rule of *Ring* is thus applicable to cases on collateral review.

The rule of *Ring* also falls within the other *Teague* exception, which applies to "watershed rules of criminal procedure" that are "'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 311 (internal citation omitted). In subsequent cases, the Supreme Court explained this exception further: A rule that qualifies under the "watershed" exception must concern the fairness or "improve the accuracy" of the criminal proceeding and must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal citations omitted); *see also O'Dell v. Netherland*, 521 U.S. 151, 167 (1997). The discussion below establishes that the *Ring* rule clearly satisfies the various standards and formulations applied to the second *Teague* exception.[5]

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[5] A case often cited as falling within the second *Teague* exception is the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), establishing that a defendant has a right to be represented by counsel in all criminal trials for serious offenses. *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

In *Ring*, the United States Supreme Court expressly overruled previously controlling precedent – its prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990). It is hard to conceive of a ruling that would be a greater "watershed" than one which explicitly overruled a prior decision. The *Ring* Court made clear that its "Sixth Amendment jurisprudence cannot be home" to both *Walton* and *Apprendi* – therefore *Walton* was overruled to "the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 122 S. Ct. at 2443; *see also Apprendi v. Arizona*, 530 U.S. 466 (2000). Although not using the term "watershed," the *Ring* Court made clear that its ruling was of "watershed" magnitude and was "implicit in the concept of ordered liberty." *See Teague*, 489 U.S. at 311.

The *Ring* rule certainly concerns the accuracy of the proceeding as well as the "bedrock procedural elements" that are essential to the "fairness of a proceeding." *See Sawyer*, 497 U.S. at 242-44. The *Ring* Court explicitly noted that the jury trial guarantee stood at the core of the Bill of Rights: "'The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." *Ring*, 122 S. Ct. at 2442 (quoting *Apprendi,* 530 U.S. at 498 (Scalia, J., concurring)). The requirement of jury factfinding is so embedded or implicit in our

concept of ordered liberty, that the "great majority of States responded to [the Supreme Court's] Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to a jury." *Ring*, 122 S. Ct. at 2442. Certainly, the constitutional requirement that facts be found by a jury is one of those "bedrock procedural elements essential to the fairness of a proceeding." *See Sawyer*, 497 U.S. at 242-44. Indeed, the *Ring* Court made clear that its decision concerned "bedrock procedural elements." It explained it was overruling precedent (*Walton*) because the "necessity and propriety" of doing so had been established. *Ring*, 122 S. Ct. at 2442. The *Ring* Court also quoted a key passage in *Duncan v. Louisiana*, 391 U.S. 145 (1968):

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . .

Ring, 122 S. Ct. at 2443 (quoting *Duncan*, 391 U.S. at 155-56). The right to a jury trial would be "senselessly diminished" if the requirement of jury factfinding was not applied to aggravating factors in a death penalty case. *Ring*, 122 S. Ct. at 2443.

With *Ring* declaring the watershed character of both its holding and that of *Apprendi*, the Eighth Circuit's decision in *United States v. Moss*, 252 F.3d 993 (8th

Cir. 2001) carries no weight. *Ring* is clearly a "watershed" decision and therefore fits within the second *Teague* exception. *Ring* concerns the fundamental fairness and "bedrock procedural elements" to an even greater degree than other rules that have been found to fit within the second *Teague* exception. *See, e.g., Smith v. Groose*, 205 F.3d 1045, 1054 (8th Cir.), *cert. denied*, 121 S. Ct. 441 (2000); *Gaines v. Kelly*, 202 F.3d 598 (2d Cir. 2000); *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992).

Because the second *Teague* exception clearly applies, the rule of *Ring* is fully applicable in Mr. Whitfield's case.

CONCLUSION

In conclusion, Mr. Whitfield asserts that a motion to recall the mandate is the proper vehicle to raise a *Ring* claim and that he is entitled to relief because the decision of this Court affirming his sentence abridged his constitutional right to jury trial under the Sixth Amendment. Mr. Whitfield may rely on the rule of *Ring* because there is no state law doctrine prohibiting retroactive application in this case. Alternatively, to the extent this Court may determine that the principles of the nonretroactivity doctrine may apply, Mr. Whitfield may still obtain relief under *Ring* for all of the reasons stated above.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing was mailed on this ____ day of October, 2002, to:

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_____
CHARLES M. ROGERS

CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Brief in Support of Motion to Recall the Mandate in the above captioned matter was prepared using Word Perfect 9.0 printed in 14 point Times New Roman proportionally spaced type font. I further certify that, in conformity with the requirements of Rule 84.06(b), the above brief contained 6836 words. I further certify that the computer diskette provided under separate cover contained four files:

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Attorney for Appellant